

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Vermont Gas Systems, Inc.,)
requesting a Certificate of Public Good pursuant)
to 30 V.S.A. § 248, authorizing the construction)
of the “Addison Natural Gas Project” consisting)
of approximately 43 miles of new natural gas)
transmission pipeline in Chittenden and Addison)
Counties, approximately 5 miles of new)
distribution mainlines in Addison County,)
together with three new gate stations in)
Williston, New Haven, and Middlebury,)
Vermont, In Re: Post Certification)
)

Docket No. 7970

Order Entered: _____

I. INTRODUCTION

In this Order, the Vermont Public Service Board (the “Board”) approves, with conditions, Vermont Gas Systems, Inc.’s (“VGS,” “Vermont Gas” or the “Company”) post-Certificate of Public Good (“CPG”) plan for the Old Stage Road reroute, shifting the pipeline from the east side to the west side of the road. The Board finds that the VGS’s proposed reroute meets the requirements for approval under 30 V.S.A. § 248(b)(5), in that the reroute will not have an undue adverse effect on aesthetics, historic sites air and water purity, the use of natural resources, the natural environment, and the public health and safety.

II. BACKGROUND AND PROCEDURAL HISTORY

The Board’s order, dated December 23, 2013 (the “December 23rd Order”), granted VGS a CPG, pursuant to 30 V.S.A. § 248, to construct a natural gas pipeline extension into Addison County, Vermont (the “Project”). The December 23rd Order also directed VGS to file a specific proposal for a reroute in the vicinity of Old Stage Road, with general guidance that the reroute

“shift the pipeline from the east side of the road (in the Hurlburt property) to the west side of the road (and into the VELCO ROW).”¹

On February 25, 2014, VGS filed a “Post-CPG Plan” for the Old Stage Road reroute in response to Condition 7 of the CPG (the “February 25th reroute”).

On April 2, 2014, the Board granted the motion to intervene of Ms. Kristin Lyons, a landowner newly affected by the proposed reroute in the Post-CPG Plan. The Board directed Ms. Lyons, in consultation with all of the parties to this Docket, to propose a procedural schedule that would conclude with a hearing date.

On April 10, 2014, Mr. Hurlburt filed a Motion to Enforce the December 23rd Order (the “Hurlburt Motion to Enforce”).

On April 16, 2014, the Board issued an Order denying the Hurlburt Motion to Enforce.

On April 25, 2014, Mr. Hurlburt requested a post-certification technical hearing.

On April 28, 2014, Ms. Lyons filed a status report with the Board regarding the scheduling of a post-certification technical hearing and indicated that it was premature to schedule a technical hearing given the ongoing discussion among herself, VGS, the Public Service Department (“PSD” or the “Department”), and Mr. Hurlburt regarding “site-specific information about the potential impacts on Ms. Lyons’ land.”

On May 1, 2014, VGS filed a status report regarding communications among VGS, Ms. Lyons, and Mr. Hurlburt in which it anticipated providing a further status update to the Board after a site visit.

On May 9, 2014, Mr. Hurlburt filed a Motion to Deny and Dismiss VGS’s February 25th reroute (the “May 9th Motion”), alleging that the February 25th reroute has adverse and undue impacts.

¹ Docket 7970, Order of 12/23/13 at 57-58.

On May 16, 2014, the Board ordered comments on the May 9th Motion to be filed with the Board no later than May 27, 2014.

On May 27, 2014, the Board received comments from VGS and the Department, both recommending that the Board deny the May 9th Motion.

On June 12, 2014, the Board found that the May 9th Motion is not ripe for a decision and ordered VGS, in consultation with the other parties, either to propose a technical hearing date or provide a status update to the Board no later than June 30, 2014.

On June 30, 2014, after consulting with the parties, VGS filed a proposed, post-certification technical-hearing schedule. In keeping with the proposed schedule, VGS filed supplemental testimony regarding the reroute on July 7, 2014.

On August 26, 2014, Ms. Lyons filed prefiled testimony, and on August 27, 2014, the Department filed prefiled testimony.

On September 11, 2014, Mr. Hurlburt filed prefiled testimony. On September 12, 2014, VGS filed a letter stating that it did not oppose Mr. Hurlburt's late-filed testimony.

The Board held a technical hearing on September 23, 2014.

The parties submitted Proposals for Decision on October 17, 2014, and reply briefs on October 31, 2014.

III. FINDINGS

Based on the evidence of record and the testimony presented at the hearing, the Board finds as follows:

A. Overview

1. Old Stage Road is a class 3, unpaved town highway. Buscher supp. pf. at 2.

2. The reroute proposed by Vermont Gas is located along an undeveloped stretch of Old Stage Road, approximately 1925 feet in length, and is entirely wooded. There are agricultural fields on the opposite side of Old Stage Road for approximately the first 650 feet of the reroute. For the remaining length of the reroute, Old Stage Road is wooded along both sides of the road. Buscher supp. pf. at 2.

3. The proposed reroute is at the farthest reaches of Ms. Lyons' 20.7-acre property, and Ms. Lyons would not be able to see the area affected by the reroute from her home. Tr. 9/23/14 at 74 (Lyons).

4. A substantial portion of the proposed reroute on the Lyons, Martin and Hurlburt properties is within the VELCO right-of-way. Billingsley supp. pf. at 4.

5. Within the area of the reroute, the Project consists entirely of buried pipeline, running parallel to the road, 10 feet outside of the road right-of-way ("ROW"), and will require a 20-foot permanent easement, 10 feet to each side of the centerline of the pipeline immediately outside of the road ROW. Buscher supp. pf. at 2-3.

6. The reroute falls within the Town of Monkton's 50-foot setback requirement where no structures may be erected. *See* exh. Pet. EMS-OSR-2 at 24-25; Simollardes supp. pf. at 3.

7. The permanent easement areas and areas within the road ROW, west of the roadway, will be cleared of vegetation for installation of the pipeline, with a maximum width of clearing of up to approximately 45 feet. Buscher supp. pf. at 3; tr. 9/23/14 at 46 (Buscher).

8. VGS proposes to complete the new alignment through open-cut excavation for the entire length of the reroute. Billingsley supp. pf. at 4.

9. The trench for the placement of the pipeline will be only four to five feet wide, and the topography impacted by the trench is generally expected to be returned to its original grade. The trench will be refilled with soil and stabilized per required EPSC plan protocols. Tr. 9/23/14 at 35 (Nelson).

10. If ledge is encountered during installation of the pipeline, ledge may be removed by excavator, trencher or blasting, depending on the nature of ledge. Tr. 9/23/14 at 34 (Nelson).

11. Ms. Lyons is unaware of any visible outcropping of ledge in the area of the proposed February 25th reroute. Tr. 9/23/14 at 79-80 (Lyons).

12. The existing VELCO overhead power line corridor on Ms. Lyons' property primarily consists of exposed ledge, with cliffs of ledge underneath the west side of the VELCO transmission lines. Tr. 9/23/14 at 74-75 (Lyons).

13. Utility companies, including natural gas companies, try to avoid working with ledge due to costs and side effects of blasting. Tr. 9/23/14 at 78 (Lyons).

14. The well on Mr. Hurlburt's property is not within the right of way and is not directly impacted by the proposed pipeline on his property. Tr. 9/23/14 at 94 (Hurlburt).

15. VGS has entered into a Memorandum of Understanding with the Vermont Agency of Agriculture, Food and Markets that specifies how VGS is to work with agricultural landowners to ensure protection of existing drainage tiles as the Project is being constructed and to repair tiles damaged during construction. Tr. 9/23/14 at 28-29 (Nelson), 53, 57 (Simollardes).

16. Any blasting on the reroute would include, where applicable, pre and post-well testing for quality and quantity of water. Tr. 9/23/14 at 12-13 (Billingsley), 34-35 (Nelson).

17. For archeological concerns associated with the Project, the artifacts may either be recovered, HDD drilling may be employed to avoid the artifacts or the pipeline may be realigned. Tr. 9/23/14 at 38 (Nelson).

18. Mr. Hurlburt has not allowed access to his property to review for archeological concerns, so the extent of any archeologically sensitive areas is unknown. Tr. 9/23/14 at 58-59 (Simollardes).

19. When able to access Mr. Hurlburt's property and prior to any construction on this property, the University of Vermont Consulting Archeology Program will need to perform their standard evaluation of archeological resources and respond with one of three choices: a "phase three" (i.e., a recovery of artifacts); an HDD drill to leave the artifacts undisturbed; or realign the pipeline to avoid the artifacts. Tr. 9/23/14 at 31-32, 38-39 (Nelson).

20. VGS's environmental consultants entered Mr. Hurlburt's property on July 5, 2012, and September 6, 2012, prior to receiving three notices of no trespass, each with a date of either January 1, 2013 or January 6, 2013. Tr. 9/23/14 at 83 (Nelson), 98 (Simollardes).

21. Mr. Hurlburt proposed a reroute that would locate the pipeline entirely within the VELCO corridor, and not on his property, but this reroute would be located on the property of new landowners who may not be aware of these proceedings. VGS's collateral permits issued by the Vermont Agency of Natural Resources and US Army Corps of Engineers for the Project reflect the reroute as proposed by VGS. Any change in this proposal would require an amendment to certain collateral permits. Mr. Hurlburt's proposed reroute also could introduce environmental or constructability issues. Tr. 9/23/14 at 50-51 (Simollardes).

B. No Undue Adverse Effects on Aesthetics

22. In our December 23rd Order, the Board did not find any undue adverse effect on aesthetics.² The proposed reroute will not result in any adverse effects on aesthetics. Buscher supp. pf. at 3-5.

23. The required clearing for the reroute will result in a noticeable change to the present configuration of vegetation along the roadway, particularly along approximately 1,200 feet of Old Stage Road where both sides of the road are wooded. Buscher supp. pf. at 3.

24. Clearing along the west side of the road will be the only visual change within the area of the reroute proposed by Vermont Gas. Buscher supp. pf. at 3.

25. The permanent easement area and areas within the road ROW, west of the roadway, will be cleared of vegetation for installation of the pipeline. This area will be seeded in accordance with the approved EPSC plan after construction and maintained as open space within the permanent Vermont Gas ROW. Buscher supp. pf. at 3.

26. This clearing will become less noticeable over time, because border and understory vegetation will grow at the base of the woods, and the trees along the side of the clearing will generate new growth. Buscher supp. pf. at 3.

27. These changes will not result in new visibility of Project infrastructure or other surrounding infrastructure, such as the adjacent VELCO transmission lines. The reroute will simply relocate the edge of the woods approximately 20 to 45 feet further west of the roadway. Buscher supp. pf. at 3.

28. After any vegetative clearing, a substantial buffer of at least 100 feet should remain between Old Stage Road and the existing VELCO transmission line. Tr. 9/23/14 at 46 (Buscher), 101 (Raphael).

² Docket No. 7970, Order of 12/23/13 at 126-27.

29. A post-construction aesthetics review of the buffer will ensure that the remaining buffer will be sufficient. Tr. 9/23/14 at 102 (Raphael).

30. VGS has implemented reasonable aesthetic mitigation measures because the Project does not have any above-grade infrastructure on the reroute, with minimal footprint due to a reduction of the ROW to 20 feet. Tr. 9/23/14 at 47 (Buscher).

31. Since the reroute does not introduce any visible infrastructure, the colors and materials are compatible, there is no visibility, and there is no effect on open space. Buscher supp. pf. at 4.

32. The Project, including the reroute, does not violate a clear written community standard, intended to preserve the aesthetic, scenic or natural beauty of the area, and is not shocking or offensive to the average person. Buscher supp. pf. at 4.

33. The aesthetic impacts of the reroute are minimal since the Board considers the entire project as a whole and examines a project's cumulative aesthetic impacts.³ Buscher supp. pf. at 4.

**C. No Undue Adverse Effects on the Air and Water Quality
and the Natural Environment**

34. The VGS-proposed reroute will not result in adverse effects on air and water quality and the natural environment. Nelson supp. pf. at 9.

35. Class Three wetlands exist along both the west and east side of Old Stage Road. The reroute has minor, temporary, and secondary impacts to these wetlands. Nelson supp. pf. at 3.

³ See Docket 6860, Order of 1/28/05 at 80.

36. The reroute reduces total impacts to wetlands from approximately 1,800 square feet under the prior alignment to 800 square feet within the area of the reroute. Nelson supp. pf. at 3; tr. 9/23/14 at 31 (Nelson).

37. No other streams, wetlands, vernal pools, floodplains, or fluvial erosion hazard zones exist within the area impacted by the reroute. Nelson supp. pf. at 3.

38. The reroute will not significantly impact the deer wintering area located on both sides of Old Stage Road. Nelson supp. pf. at 4.

39. No rare, threatened or endangered plant species were identified. Nelson supp. pf. at 4.

40. The reroute will not affect rare, threatened or endangered animals species, including trees along Old Stage Road that could be used for bat maternity roosting habitat. Nelson supp. pf. at 4-5.

41. The February 25th reroute is not near and does not impact the stream where Mr. Hurlburt saw the hornback minnow. Tr. 9/23/14 at 95-96 (Hurlburt).

42. The hornback minnow is not listed on either the rare species or threatened/endangered species lists maintained by ANR. Tr. 9/23/14 at 24 (Nelson).

43. The reroute avoids any impacts to a significant natural community of Mesic Maple-Ash-Hickory-Oak forest, whereas the earlier proposed 6/28/13 Alignment resulted in some tree clearing of this significant natural community, although the impact of which was not considered to be significant or adverse. Nelson supp. pf. at 5-6.

44. The EPSC plan has been updated to include appropriate best management practices, consistent with the VT DEC Standards and Specifications for Erosion Prevention and Sediment Control, and to include the reroute. Nelson supp. pf. at 7.

45. The reroute meets the applicable criteria regarding undue water or air pollution [10 V.S.A. § 6086(a)(1)], headwaters [10 V.S.A. § 6086(a)(1)(A)], waste disposal [10 V.S.A. § 6086(a)(1)(B)], and soil erosion [10 V.S.A. § 6086(a)(4)], as evidenced by issuance of the Construction Stormwater Discharge Permit #6949-INDC and the Section 401 Water Quality Certification. Nelson supp. pf. at 8.

46. The reroute meets the applicable criteria regarding floodways [10 V.S.A. § 6086(a)(1)(D)], streams [10 V.S.A. § 6086(a)(1)(E)], and shorelines [10 V.S.A. § 6086(a)(1)(F)], as evidenced by the issuance of the Stream Alteration Permit #SA-5-9029 and the Section 401 Water Quality Certification. Nelson supp. pf. at 8-9.

47. The reroute meets the applicable criteria regarding wetlands [10 V.S.A. § 6086(a)(1)(G)] and Rare and Irreplaceable Natural Areas, Necessary Wildlife Habitat, Endangered Species [10 V.S.A. § 6086(a)(8)], as evidenced by the issuance of Vermont Wetland Permit #2012-184 and the Section 401 Water Quality Certification. Nelson supp. pf. at 9.

IV. DISCUSSION AND CONCLUSION

The principal issue raised concerning the reroute proposed by VGS concerns the aesthetic impact. Section 248(b)(5) requires the Board to find that a project “will not have an undue adverse effect on aesthetics,” after giving due consideration to Act 250 criterion 8. Criterion 8 “was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever.”⁴

⁴ *Re: Okemo Mountain, Inc.*, #2S0351-8-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Env. Bd. Dec. 18, 1986).

“[T]he Board applies the so-called ‘*Quechee* Test’ to determine whether a project’s [aesthetic] impacts will be unduly adverse.”⁵ The first prong of this test asks whether the proposed project “will have an adverse impact on scenic and natural beauty.”⁶ If the answer is in the affirmative, the inquiry then advances to the second prong to determine if the adverse impact would be “undue.”⁷ Under the second prong, an adverse impact is undue if any one of three questions is answered in the affirmative: (1) does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area?; (2) does the project offend the sensibilities of the average person?; and (3) have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?⁸

In addition to the *Quechee* Test analysis, the Board’s consideration of aesthetics and an assessment of whether a project will have an undue adverse effect is “significantly informed by overall societal benefits of the project,”⁹ and while the Board does consider site-specific aesthetic effects, we consider the project as a whole and its cumulative effects—we do “not review portions simply as if they were stand-alone projects.”¹⁰

While tree clearing along the west side of Old Stage Road impacts the scenic and natural beauty of the area to an extent, we find that impact does not rise to the level of being “adverse” since the clearing merely relocates the edge of the woods approximately 20 to 45 feet further

⁵ Docket No. 7844, Order of 1/22/13 at 25 (citing *In re UPC Vermont Wind, LLC*, 144 VT 2009 ¶ 24). See also *In re Cross Pollination for a 30 V.S.A. Section 248 Certificate of Public Good*, 2012 VT 29, ¶ 10; *Quechee Lakes Corp.*, 154 Vt. 543, 555-57 (1990).

⁶ *In re Cross Pollination for a 30 V.S.A. Section 248 Certificate of Public Good*, 2012 VT 29, ¶ 10. See also *In re Halnon*, 174 Vt. 514, 515 (2002).

⁷ *In re Halnon*, 174 Vt. 514, 515 (2002).

⁸ *Id.* See also Docket No. 7844, Order of 1/22/13 at 25-26; Docket No. 7373, Order of 2/11/09 at 98-99; Docket No. 6860, Order of 1/28/05 at 79-80.

⁹ Docket No. 7373, Order of 2/11/09 at 99; Docket No. 6792, Order of 7/17/03 at 28; Docket No. 7156, Order of 8/8/07 at 65.

¹⁰ Docket No. 6860, Order of 1/28/05 at 80.

west of the roadway. Also, no portion of the pipeline and its related infrastructure will be visible, and the land affected by the tree clearing will be reseeded and will undergo a post-construction aesthetic review to determine whether any further plantings are necessary to supplement an approximately 100 foot buffer that both aesthetic experts consider substantial.

On the second prong, we agree with both experts and find that even if the impact was adverse the impact would not be considered undue. In particular, we find that the reroute proposed by VGS does not violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area, as no standard has been identified in these proceedings.

We also find that the reroute would not be shocking or offensive to the average person. When considering whether an average person would find the proposed project shocking or offensive, this Board “adopts the perspective of an average person in the community.”¹¹ This Board has clarified that “[w]hile some individuals who live close to the proposed project may find the proposed project offensive, they are not representative of the ‘average person’ because of their personal interest in the area and their opposition to the change.”¹² Adjacent landowners, who will mostly likely be impacted by a view of a project “have an individualized perspective which, by definition, is different from the viewpoint of the average person.”¹³ The landowners affected by the reroute are not relevant to the “average person” analysis under the *Quechee* Test. We find that VGS has taken mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings. In particular, no portion of the pipeline and its related infrastructure will be visible, and the right of way for the reroute has been reduced

¹¹ CPG #NM-4188, Order of 9/10/14 at 6 (citing *In re McShinsky*, 153 Vt. 586, 592-593 (1990)). See also Docket No. 8148, Order of 6/30/14, at 38-39.

¹² Docket No. 5823, Order of 5/16/96 at 26.

¹³ Docket No. 8148, Order of 6/30/14 at 38-39.

to twenty feet.¹⁴ Additionally, the land affected by the tree clearing will be reseeded and will undergo a post-construction aesthetic review to determine whether any further plantings are necessary to supplement an approximately 100-foot buffer that both aesthetic experts already consider substantial.

Finally, in the absence of any evidence to the contrary and considering that the proposed reroute results in an approximately 1000-square foot reduction of impact to wetlands, we find that the proposed reroute will not result in adverse effects on the air and water quality and the natural environment. For the reasons explained above, we approve the reroute filed by VGS on February 25, 2014.

¹⁴ Tr. 9/23/14 at 46-47 (Buscher).

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the State of Vermont
Public Service Board that:

1. The reroute filed by VGS on February 25, 2014 is approved. VGS shall construct the Old Stage Road pipeline reroute consistent with the provisions of this Order and the December 23rd Order.

2. VGS shall return Ms. Lyons' land impacted by the construction of the pipeline to its original contours to the extent reasonably possible.

3. VGS shall conduct a post-construction aesthetics review and shall plant reasonably mature vegetation, taking the location of the pipeline into account, if that review determines that additional buffer is necessary in order to provide screening of the VELCO corridor.

4. Mr. Hurlburt's May 9th Motion is hereby dismissed.

Dated at Montpelier, Vermont, this ____ day of _____, 2014.

_____)	PUBLIC SERVICE
_____)	
_____)	BOARD
_____)	
_____)	OF VERMONT
_____)	

A TRUE COPY:
OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Board

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